INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	3
Conclusion	16

CITATIONS

Cases:	
Clark v. *United States*, 289 U. S. 1	10
Hoss v. *United States*, 232 Fed. 328	15
Hyde v. *United States*, 225 U. S. 347	10
Mattox v. *United States*, 146 U. S. 140	10, 11
McDonald v. *Pless*, 238 U. S. 264	10
Mulloney v. *United States*, 79 F. 2d 566, certiorari denied, 296 U. S. 658	15
Southern Pac. Co. v. *Klinge*, 65 F. 2d 85, certiorari *denied*, 290 U. S. 657	10, 11
Young v. *United States*, 163 F. 2d 187, certiorari denied, 332 U. S. 770	10
Statute:	
12 U. S. C. 592	2
Miscellaneous:	
Federal Rules of Criminal Procedure:	
Rule 8(a)	13
Rule 8(b)	14
Rule 22	14

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 192

HUGH NAMON RAKES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 268-279) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered July 2, 1948 (R. 279). The petition for a writ of certiorari was filed August 2, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended

by the Act of February 13, 1925 (now 28 U. S. C. 1254). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a motion to suppress the use as evidence of documents alleged to have been taken from petitioner illegally was properly denied.

2. Whether a motion for a new trial was properly denied.

3. Whether petitioner was prejudiced by the trial judge's instruction to the jury that they should not be influenced in reaching a verdict by the fact that the evidence might have tended to show that petitioner committed other offenses than those charged.

4. Whether a motion to quash the indictment because of an alleged misjoinder of offenses and defendants was properly denied.

5. Whether a motion for change of venue was properly denied.

STATEMENT

A 20-count indictment (R. 1-24) filed in the District Court for the Eastern District of Virginia charged one William Gardner, First Vice President of the Farmers and Merchants State Bank of Fredericksburg, Virginia, with wilful misapplication of funds of the Bank, in violation of 12 U. S. C. 592. Each count referred to a separate misapplication. Petitioner was charged

as an aider and abettor in thirteen of the transactions involved (counts 1-2, 4-6, 8-11, 14-16, and 18). Eight other persons, including petitioner's wife, were also charged as aiders and abettors, some in some counts and some in others. Severances were ordered, and petitioner and his wife, the latter being charged as an aider and abettor in ten of the counts, were tried together by a jury. She was acquitted, and he was convicted on all thirteen counts (R. 160). He was sentenced on each of three of the counts (1, 2, and 5) to three years' imprisonment, the terms to run concurrently, and on the other ten counts he was sentenced generally to five years' imprisonment. Execution of the five-year sentence was suspended and he was placed on probation for five years as to it. In addition, he was fined $5,000 on each of counts 1 and 5. (R. 180.) On appeal, the judgment of conviction was affirmed (R. 279).

Since petitioner does not question the sufficiency of the evidence supporting his conviction, it is unnecessary to review it here. The evidence is summarized, however, in the opinion of the circuit court of appeals (R. 269-271).

ARGUMENT

1. Petitioner contends that the trial court erred in denying a motion to suppress the use as evidence of certain documents relating to his financial affairs which had allegedly been taken from him illegally (Pet. 9-10, 13-19). The contention, how-

ever, is based on the assumption that the court was required to believe the testimony of his wife in support of the motion (R. 76-80), but since this testimony was sharply in conflict with the Government's evidence in all material respects (R. 73-74, 250-255), the denial of the motion was clearly justified.

Petitioner's wife's version of the circumstances under which the Government came into possession of the documents in question was as follows: Pursuant to petitioner's instructions to bring his bank statements, checks, notes, etc. from Floyd, Virginia, to Fredericksburg to give to him, she put them in a box and drove with them to Fredericksburg. There, two F.B.I. agents, Sauer and another, approached her on the street and asked her if she had petitioner's "records, cancelled checks, and things," explaining that petitioner "was having those things * * * assembled for us. He has promised to give them to us and we would like to have them." (R. 76-77.) She refused, according to her testimony, saying that petitioner "asked me to bring them to him at the [Wakefield] hotel," where he was to meet her that afternoon (R. 77-78). She then went to her room at the Wakefield. She had no sooner entered the room than "the phone rang, and it was Mr. Sauer, and he said, 'I hope you have reconsidered about giving us those papers and documents. It is imperative that we have them. * * *.'" She again refused, saying she "would rather not give them

to you until Mr. Rakes comes and sees them, and he will give them to you." (R. 78.) During the next 30 or 40 minutes, she testified, Sauer called her "three or four or five times" with the same request, and she gave the same answer (R. 78-79). On one of the calls, she said, Sauer "reminded" her that the Government "had ways to get whatever records or documents * * * they should need." Finally, she testified, she yielded to the agents' persistent demands, went downstairs to her car, which was parked "on the upper side of the service station at the Wakefield Hotel," unlocked the car and gave the agents the box of documents. Petitioner, she added, was later "very much annoyed" at her disobedience in not waiting for his arrival before surrendering his papers. (R. 79.)

Agent Sauer, however, gave a very different account of the circumstances surrounding his obtaining of petitioner's papers. He testified that when he first met petitioner, following a long investigation of his transactions, petitioner "expressed a willingness to cooperate on the investigation, and he said he would furnish all of his personal records that might be required * * *. That was on the 13th of June, 1944. He stated he would have to assemble those records, because a part of them were up at the Mill Garden farm near Fredericksburg and other records were in Floyd, and some possibly at other farms." "Between that time and June 28, 1944," Sauer con-

tinued, "I had a number of telephone contacts with Mr. Rakes in regard to the records, and he promised to bring them to Fredericksburg on June 28, 1944." (R. 250.) "That evening," Sauer further testified, "I contacted his hotel, where he regularly stopped, the Wakefield Hotel at Fredericksburg and Mrs. Rakes responded and said she had the records, but Mr. Rakes was not there, and I told her that he had promised us the records, and if it was possible I would like to go up and get the records that evening, and she said she had the records in her car and there would be no occasion for me to drive up there. It is about a mile from the Princess Anne Hotel up to the Wakefield, and she said she would bring them down, and I proposed—I had never met Mrs. Rakes—I proposed that I would stand immediately in front of the Princess Anne so that I could be identified, and would receive the records there. Special Agent Percy Smith and I waited for Mrs. Rakes, and she brought a number of boxes, which were delivered to us at the curb" (R. 250-251). On cross-examination, Sauer specifically contradicted petitioner's wife's testimony that he had had more than one telephone conversation with her (R. 252, 253, 254), that the papers were delivered to him at the Wakefield Hotel (R. 252), that she had urged him to "wait until her husband got there so that he could examine" the papers before surrendering them (R. 253), and that he, Sauer, had told her that if she did not

deliver the papers, he "had a way to get them" (R. 253). Sauer also testified that some of petitioner's bank statements were "missing" from the papers delivered by his wife, and that petitioner subsequently brought the missing statements to the agents (R. 255).

It is manifest that if Sauer's version of the circumstances under which petitioner's financial papers came into his possession was the true one, as the district court obviously believed, "there was in fact," as the circuit court of appeals observed (R. 274), "no search, no seizure and no compulsion," and hence no basis for the motion to suppress.[1]

2. Some time after verdict and judgment, three of the jurors submitted a "petition" to the trial judge asking that petitioner's prison sentence be vacated and that he be put on probation (R. 259-260). In it they expressed the opinion that petitioner "was the victim of and subject to the influence of the defendant Gardner * * *, and that he did not initiate any scheme to defraud the Bank

---

[1] It may be noted that Mrs. Rakes' testimony was not only in sharp conflict with that of Sauer, but was also inconsistent with that of Akers, another defense witness. Akers testified that he saw two men approach Mrs. Rakes' car while it was parked near the Wakefield Hotel and take "a package, box or something" from it; he said that the men removed the box from the car themselves and that Mrs. Rakes was not with them (R. 198-200, 202). Under the circumstances, the trial court was obviously justified in disbelieving Mrs. Rakes' version of the manner of delivery of the papers in question, and accepting Sauer's account as the true one.

at Fredericksburg, but aided the defendant Gardner without full knowledge of or fully understanding the meaning of his acts or conduct." They also stated that "had they known in advance of their verdict that the defendants Robey and Proffit,[2] who were indicted with the defendant Rakes, were not legally guilty of the charges against them and would be so found by the Court, such fact would have had strong influence upon the verdict of the signers of this petition and their consideration of the case against the defendant Rakes."

In a similar petition (R. 260-261), seven different jurors stated that "they very reluctantly agreed to rendering a verdict of 'Guilty' against the defendant Rakes, believing at all times that there was serious doubt as to his guilt, but they finally yielded upon arguments of their co-jurors." They further stated that if they "had known that the defendants * * * Proffit and * * * Robey * * * would be found 'Not Guilty' by the Court, they would never have consented to a verdict of guilty against the defendant Rakes," and that when they returned their verdict they "verily believed from information they had that * * * Proffit and * * * Robey had entered Pleas of Nolo Contendere. They did not know that they

---

[2] These two codefendants of petitioner, also named as aiders and abettors of Gardner in certain counts, obtained a severance, waived trial by jury, and were acquitted by the court some time, apparently, following petitioner's trial.

had secured a separate trial and that the Court would later return a verdict or judgment that they were not guilty."

On the basis of the above petitions, neither of which was sworn to, petitioner filed a motion for a new trial (R. 262-264), which was denied (R. 266-267).[3] Petitioner contends that this was error (Pet. 10, 19-22). The contention, we submit, is without merit.

In the first place, it is well established that "ordinarily jurors in the United States Courts will not be heard to give testimony, either oral or by affidavit, for the purpose of impeaching the verdict returned where the facts sought to be shown are such that they essentially inhere in the

---

[3] In his order denying a new trial, the judge said that he was "not impressed with the statement of the jurors to the effect that they did not know that Robey and Proffit secured a separate trial. They were instructed by the court during the progress of the trial to disregard what happened to the other defendants for the reason that the only ones on trial were Hugh N. Rakes and his wife and they should consider the evidence only as it related to each of these two defendants. * * * The jury had no opportunity to hear the evidence of the defense so far as it related to Proffit and Robey and were not in a position to pass on their guilt or innocence, and if the jury permitted such considerations to enter into its deliberations the jury disregarded the plain and repeated instructions of the court throughout the length of the trial" (R. 267). The judge also remarked that "This is the second time the defendant has been found guilty of the charges by a jury of twelve men. The verdict in the first trial was set aside on account of an improper approach having been made to one of the jurors during that trial * * *" (R. 266). "Lastly," the judge said, "there is no doubt in my mind of the defendant's guilt * * * and I am further convinced that the ends of justice do not warrant the court in granting a new trial" (R. 267).

verdict." *Young* v. *United States*, 163 F. 2d 187, 188 (C.C.A. 10), certiorari denied, 332 U. S. 770.[4]

Secondly, as pointed out by the circuit court of appeals (R. 276), "if these jurors had done what they are represented as saying they would have done (that is, voted this appellant not guilty merely because other defendants in other cases

---

[4] See also the numerous authorities cited in the *Young* opinion, including *Clark* v. *United States*, 289 U. S. 1, 18, *McDonald* v. *Pless*, 238 U. S. 264, and *Hyde* v. *United States*, 225 U. S. 347, 381-384. The *Young* opinion distinguished *Southern Pac. Co.* v. *Klinge*, 65 F. 2d 85 (C.C.A. 10), certiorari denied, 290 U. S. 657, relied on by petitioner (Pet. 21-22), pointing out that in that case "part of the misconduct [consisting of one juror's having an outside contact, obtaining from that source confirmation of certain information respecting the case, and relaying the confirmation to other jurors] took place outside the jury room, separate and apart from the deliberations of the jury" (163 F. 2d at 189), a factor entirely absent here.

Mattox v. *United States*, 146 U. S. 140, cited in the *Young* opinion as an exception to the general rule based on considerations of sound public policy (163 F. 2d at 188), involved an extreme situation in a capital case. There, a newspaper article containing such grossly prejudicial statements as "If [Mattox] is not found guilty of murder he will be a lucky man, for the evidence against him was very strong * * *," "* * * it was expected that [the jury's] deliberations would not last an hour * * *," "* * * friends of Mattox gave up all hope of any result but conviction," "[Mattox] has been tried for his life once before," etc. (146 U. S. at 143-144), had been introduced into the jury room and read to the jury during their deliberations. Also, the bailiff in charge of the jury had told them, "This is the third fellow he has killed" (146 U. S. at 142). This Court held that the trial court erred in refusing to admit affidavits of jurors attesting to the above incidents in support of a motion for a new trial, observing that the "public policy which forbids the reception of the affidavits, depositions or sworn statements of jurors to impeach their verdicts, may in the interest of justice create an exception to its own rule, while, at the same time, the necessity of great caution in the use of such evidence is enforced" (146 U. S. at 148).

were found not guilty) they would have been guilty of gross violation of their duty. They were sworn to reach a verdict upon the evidence before them as to this appellant in this case. * * * Jurors cannot be heard to say that if they had had certain information they would have violated their obligations as jurors. The remainder of the petitions * * * is merely a recitation that the jurors did not understand or would have ignored the clear instructions of the court [*i.e.*, on reasonable doubt]."

Finally, as has so often been pointed out, the granting or denial of a new trial rests in the sound discretion of the trial judge. Here, the judge did not refuse to consider the statements made in the jurors' petitions and thus arbitrarily decline to exercise discretion (as in the *Mattox* and *Klinge* cases, referred to in fn. 4, *supra*, p. 10). On the contrary, he gave due consideration to the statements, but in his discretion decided that "the ends of justice do not warrant the court in granting a new trial" (R. 267; see fn. 3, *supra*, p. 9).

3. Among the exhibits in evidence were certain instruments which the Government contended, and offered evidence to prove, had been forged by petitioner in the course of the fraudulent check-kiting activities carried on by him and the principal defendant Gardner (see R. 138-140). In his charge to the jury, after reviewing the evidence relating to these alleged forgeries, the trial judge

gave the unsolicited precautionary instruction that though there had been evidence of "transactions on the part of the defendant that perhaps would make him guilty of some other crime," the jury had "no right to convict him of the other crimes. Your consideration must be confined to the charge set out in the bill of indictment" (R. 141). Counsel for petitioner made no objection to this instruction. Notwithstanding the failure to object, it is now contended that the judge's reference to possible "other crimes" of petitioner was prejudicial (Pet. 10, 22-24).

The contention is plainly insubstantial. As pointed out by the circuit court of appeals (R. 275), "the admonition was not only proper but was required." The jury had heard all the evidence relating to the alleged forgeries, and obviously, therefore, the judge's admonition could not have had the effect of giving them information about something they would not otherwise have known anything about. The instruction was manifestly designed to protect petitioner from the very danger he now complains it might have been instrumental in causing, *viz.*, a finding of guilt based in part on his commission of extraneous crimes. And the failure of petitioner's counsel to object to the giving of the instruction is persuasive proof that he considered it helpful to petitioner at the time.

4. Petitioner contends that the trial court erred in refusing to quash the indictment because of an

alleged misjoinder of offenses and of defendants (Pet. 11, 24-25). There is no merit in the contention.

With respect to the alleged misjoinder of offenses, it is to be noted that Rule 8(a) of the Federal Rules of Criminal Procedure, which substantially restates previously existing law (see Advisory Committee's note), provides that two or more offenses may be charged in the same indictment in separate counts if the offenses "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." And, as pointed out by the court below (R. 273), "The several offenses charged in this indictment were not only similar but were based on transactions constituting parts of a common plan, clear upon the face of the indictment; all the counts relate to the appellant's elaborate check-kiting scheme."

With respect to the alleged misjoinder of defendants, the severance, by virtue of which petitioner stood trial with his wife as his only co-defendant, is a sufficient answer to the claim of prejudice in this respect. Moreover, as stated in the opinion below (R. 273), "These other persons * * * were alleged to have taken part in the same check-kiting scheme (and mostly in connection with the same checks) in which appellant was alleged to have been engaged. They were

officers of the various banks and signers in various capacities on the checks or notes which made up the operation. If a person knowingly aids and abets, in conjunction with various others, in some of a series of related transactions, he can hardly be heard to complain if he is charged in company with his fellow participants. The ends of justice are not served in such a case by a multiplicity of separate indictments for each participant and each transaction." See also Rule 8 (b), F. R. Crim. P., providing that "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

5. Petitioner's contention that the trial judge abused his discretion in denying his and his wife's joint motion for a change of venue (Pet. 11, 25-26) is also without merit. In the first place, the motion was not made until after the *voir dire* examination of prospective jurors and the actual empanelling of the jury which sat on the case (cf. Rule 22, F. R. Crim. P.) (R. 93-94). Furthermore, while the affidavit in support of the motion charged that more than half of the "approximately 100 veniremen" who had been examined on *voir dire* had expressed "deep convictions and strong opinions

against the innocence of these defendants," it alleged in respect of the jurors who actually sat on the case merely that some of them "may have an undercurrent" of bias against them (R. 94-95). Such a speculative allegation was clearly insufficient to require granting of the tardy request for a change of venue. The court below, we submit, adequately answered petitioner's contention when it said (R. 278), "No charge is made respecting the individuals who composed the jury. This trial was in Richmond. It would take strong evidence that in so large a city an impartial jury could not be found to try an offense committed in Fredericksburg, a smaller city some fifty miles away. Change of venue lies largely in the discretion of the trial court. That this discretion was not abused in the present case is shown not alone by the satisfaction of the judge upon the *voir dire* examination, but also by the fact that this jury acquitted appellant's co-defendant upon all counts." We would add only that the jurors' petitions to the trial judge to show greater leniency to petitioner than he had shown, discussed in another connection at pp. 7-11, *supra*, negative any suggestion of bias against petitioner.[5]

---

[5] Petitioner also complains of the trial judge's refusal to charge that he could not be convicted unless it was shown that the bank whose funds were allegedly misapplied "wholly lost" such funds (Pet. 26-27). But no such proof was required. *Mulloney* v. *United States*, 79 F. 2d 566, 581 (C.C.A. 1), certiorari denied, 296 U. S. 658; *Hoss* v. *United States*, 232 Fed. 328, 334 (C.C.A. 8). Moreover, as pointed out by the court below (R. 272), the indictment did not allege total loss to

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court and should, therefore, it is respectfully submitted, be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
Attorneys.

SEPTEMBER 1948.

---

the bank of its funds, as petitioner implies (Pet. 26), but merely that "the possession, control and use" of the funds were "wholly lost" to it (R. 3, 4, 5, etc.), and "The proof amply supported that charge" (R. 272). And any suggestion intended by petitioner (see Pet. 27) that the bank was not injured as a consequence of the elaborate check-kiting activities of petitioner and Gardner (see R. 269-271) is answered by the fact that the bank ultimately failed when their scheme of operation collapsed (R. 271).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1948 804198 104